This can be achieved through conferences. Willingness on the part of the states to coöperate will do much toward decreasing the necessity for stringent federal control and go far toward facilitating the work of the commission.

THE EFFECT OF A DEFENDANT'S REFUSAL TO RETRACT ON A QUALIFIED PRIVILEGE IN DEFAMATION. — The victim of a defamatory publication and the public are interested in having the author make an adequate retraction. The public is interested in the truth. The victim is interested in the restoration of his reputation. The German law permits a plaintiff who cannot show economic injury to secure a retraction (*Ehrenerklärung*).[1] The Dutch law allows generally the recovery of a similar "honorable amends."[2] In our law, a retraction has primarily evidential effect.[3] It is not a defense.[4] If, however, it is made in the same conversation with the utterance of a slander, and in such a way as to destroy its defamatory effect, it defeats recovery.[5] Further, a retraction may sometimes be shown in mitigation of damages.[6] It may be evidence of the absence of the "malice" necessary to punitive damages;[7] and it may be evidence that the plaintiff has suffered less than he claims in actual damages.[8] In many jurisdictions this subject is regulated by

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[1] See 2 CROME, SYSTEM DES DEUTSCHEN BÜRGERLICHEN RECHTS, 1028; SCHUSTER, THE PRINCIPLES OF GERMAN CIVIL LAW, 340. The French law authorizes a publication of a judgment for defamation at the defendant's expense. DEMOGUE, DE LA RÉPARATION CIVILE DES DÉLITS, 44–47; 4 GARSONNET AND CÉZAR-BRU, DE PROCÉDURE, 36–37. For a comment on an English case in which the court vindicated the plaintiff while rendering judgment for the defendant, see Roscoe Pound, "Equitable Relief against Defamation and Injuries to Personality," 29 HARV. L. REV. 640, 670. *Cf.* Couper *v.* Lord Balfour of Burleigh, [1913] S. C. 492.

[2] This is a civil remedy, concurrent with the recovery of "profitable amends." See DE VILLIERS, THE ROMAN AND ROMAN-DUTCH LAW OF INJURIES, 173–181; VAN DER LINDEN, INSTITUTES OF HOLLAND, § 152. A voluntary retraction will defeat the recovery of "honorable amends," and mitigate "profitable amends." See DE VILLIERS, *op. cit.*, 244–246.

[3] See Wesley N. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning: Operative Facts Contrasted with Evidential Facts," 23 YALE L. J. 16, 25–28. For a full note on the subject of retraction, see 13 A. L. R. 794.

[4] Lehrer *v.* Elmore, 100 Ky. 56, 37 S. W. 292 (1896); Dixie Fire Insurance Co. *v.* Betty, 101 Miss. 880, 58 So. 705 (1912). It is good consideration for an agreement not to sue. Boosey *v.* Wood, 3 Hurl. & Colt. 484 (1864); Marks *v.* National Fire Insurance Co., 129 La. 903, 57 So. 168 (1911). Publication of a retraction on request does not, *per se*, constitute an accord and satisfaction. Dixie Fire Insurance Co. *v.* Betty, *supra*.

[5] Trabue *v.* Mays, 3 Dana (Ky.) 138 (1835); Linney *v.* Maton, 13 Tex. 449 (1855).

[6] Coffman *v.* Spokane Chronicle Publishing Co., 65 Wash. 1, 117 Pac. 596 (1911); Dixie Fire Insurance Co. *v.* Betty, *supra*. An offer to retract may similarly be shown in mitigation. Dalziel *v.* Press Publishing Co., 102 N. Y. Supp. 909 (1906). But an offer to publish a statement by the person defamed is not, in this respect, like an offer to retract. Constitution Publishing Co. *v.* Way, 94 Ga. 120, 21 S. E. 139 (1894). The failure of a plaintiff to request retraction is no mitigation. Coffman *v.* Spokane Chronicle Publishing Co., *supra*. On retraction and mitigation, see NEWELL, SLANDER AND LIBEL, 3 ed., § 1062.

[7] Fessinger *v.* El Paso Times Co., 154 S. W. 1171 (Tex. App., 1913); Myerle *v.* Pioneer Publishing Co., 178 N. W. 792 (N. D., 1920). It must be on this ground that an offer to retract is admissible in mitigation. Dalziel *v.* Press Publishing Co., *supra*.

[8] Turner *v.* Hearst, 115 Cal. 394, 47 Pac. 129 (1896); Myerle *v.* Pioneer Publishing Co., *supra*. Thus it has been held that, under a statute making it a bar to re-

statutes. A common provision is that, regarding certain newspaper libels, a request for a retraction shall be a condition precedent to the recovery of punitive damages, and a retraction shall defeat any claim therefor.[9] To be effective, a retraction must be full and unequivocal;[10] must be given a publicity equal to that of the original statement;[11] and in some states it must be made before the beginning of an action.[12]

A refusal to retract may also have considerable practical importance. It deprives the victim of a vindication which he deserves. It may increase the original injury by confirming people in their belief in the truth of the defamatory statement. Where the plaintiff has requested a retraction,[13] therefore, a refusal may sometimes be shown in aggravation of damages,[14] as evidence of the "malice" which warrants punitive damages, or as increasing the actual injury suffered.

As retraction may be evidence of an absence of "malice," and refusal to retract may be evidence of its presence, when punitive damages are

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covery of punitive damages, a retraction may also be shown in mitigation of actual damages. White *v.* Sun Publishing Co., 164 Ind. 426, 73 N. E. 890 (1905); Webb *v.* Call Publishing Co., 180 N. W. 263 (Wis., 1920).

[9] To compare the statutes on the subject, which vary considerably, see: 1907 ALA. CODE, §§ 3749, 3750, 3751, 3752, 3753; 1914 IND. BURNS ANN. STAT., §§ 380–381; 1913 IA. CODE S. S., § 3592a; 1922 KY. CARROLL'S STAT., § 2438b, 1; 1916 ME. REV. STAT., c. 87, § 46; 1921 MASS. GEN. LAWS, c. 231, § 93; 1912 NEV. REV. LAWS, § 6430; 1913 N. D. COMP. LAWS, §§ 9555, 9562; 1918 N. Y., 5 BIRDSEYE, CUMMING & GILBERT CONSOL. LAWS, § 1344; 1919 N. C. CONSOL. STAT., §§ 2429, 2430, 2431; 1920 COMPLETE TEX. CIVIL STAT., art. 5596; 1917 UTAH COMP. LAWS, § 3692; 1919 VA. ANN. CODE, § 6240; 1913 W. VA. CODE, § 4904; 1919 WIS. STAT., § 4256a. The English statute was the parent of this legislation. See 1843, 6 & 7 VICT., c. 96, §§ 1, 2; 1845, 8 & 9 VICT., c. 75, § 2. For a discussion of this act, see BOWER, CODE OF ACTIONABLE DEFAMATION, § 52; ODGERS, DIGEST OF THE LAW OF LIBEL AND SLANDER, 5 ed., 404–406, 613–640, 644, 783–787. In the United States it has been held that such a statute cannot constitutionally provide that a retraction shall deprive a plaintiff of all but "special damages." Park *v.* Detroit Free Press Co., 72 Mich. 560, 40 N. W. 731 (1888); Hanson *v.* Krehbiel, 68 Kan. 670, 75 Pac. 1041 (1904). *Cf.* Post Publishing Co. *v.* Butler, 137 Fed. 723 (6th Circ., 1905); Allen *v.* Pioneer Press Co., 40 Minn. 117, 41 N. W. 936 (1889), *contra*. The statute in question was condemned also for its common feature in applying only to newspapers in Park *v.* Detroit Free Press Co., *supra*. *Contra*, Allen *v.* Pioneer Press Co., *supra;* Osborn *v.* Leach, 135 N. C. 628, 47 S. E. 811 (1904).

[10] Monaghan *v.* Globe Newspaper Co., 190 Mass. 394, 77 N. E. 476 (1906); Goolsby *v.* Forum Printing Co., 23 N. D. 30, 135 N. W. 661 (1912). *Cf.* Dalziel *v.* Press Publishing Co., *supra*.

[11] Lafone *v.* Smith 3 Hurl. & Nor. 735 (1858); Storey *v.* Wallace, 60 Ill. 51 (1871). In the latter case, however, the jury was permitted to give the retraction some effect.

[12] Evening News Association *v.* Tryon, 42 Mich. 549, 4 N. W. 267 (1880); Byrne *v.* News Corporation, 195 Mo. App. 265, 190 S. W. 933 (1916). *Contra*, Turner *v.* Hearst, *supra*. The question of the sufficiency of a retraction has been held for the court. Gray *v.* Times Newspaper Co., 74 Minn. 452, 77 N. W. 204 (1898). *Contra*, Turner *v.* Hearst, *supra*.

[13] Reid *v.* Nichols, 166 Ky. 423, 179 S. W. 440 (1915). The failure of a newspaper to publish news of a pending libel action against it, may be used in the action as evidence of "malice." Post Publishing Co. *v.* Hallam, 59 Fed. 530 (6th Circ., 1893). A letter threatening suit is not a request for retraction. Bird *v.* Press Publishing Co., 154 App. Div. 491, affd., 214 N. Y. 645, 108 N. E. 1089 (1915).

[14] Simpson *v.* Robinson, 12 Q. B. 511 (1848); Wallace *v.* Jameson, 179 Pa. St. 98, 36 Atl. 142 (1897); Crane *v.* Bennett, 177 N. Y. 106, 69 N. E. 274 (1904). *Cf.* Couper *v.* Lord Balfour of Burleigh, *supra*.

in question; so the one or the other may be evidence of the absence or presence of the same elusive quality in privileged communications.[15] A *dictum* in a recent Canadian case suggests the view that a refusal to retract might well be given a somewhat broader effect.[16] If a defendant has published statements defamatory of the plaintiff, though "in good faith" and on a conditionally privileged occasion; and if, when the plaintiff brings him evidence sufficient to convince a reasonable man of their falsity, he refuses to take reasonable measures to counteract their effects, it may well be argued that he ought to lose the protection of the privilege. The private and social interests in having certain types of communication freely made[17] must be weighed against the interests in having false and defamatory reports of the same types corrected. The interests of the parties to the communication and of society in having a master, so long as he acts "in good faith," perfectly free to give his servant a false and defamatory "character," [18] do not seem equal to the interests of the servant, the person to whom the communication was made, and the public, in having the master take reasonable steps to rectify his statement on proof of its falsity. Similarly, one who issues a mistaken and defamatory credit report,[19] and refuses to take reasonable steps to give notice of the error, when he knows of it, ought not to be protected.

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[15] Compare the effect of repetition. Hemmings *v.* Gasson, 27 L. J. Q. B. (N. S.) 252 (1858); Sclar *v.* Resnick, 185 N. W. 273 (Ia., 1921). See Ely *v.* Mason, 115 Atl. 479, 482 (Conn., 1921). See 16 HARV. L. REV. 147.

The nature of the "malice" which destroys immunity for a false defamatory publication on a conditionally privileged occasion is not entirely clear. By the better American view negligence, or want of "probable cause," is enough to defeat a qualified privilege. White *v.* Nichols, 3 How. (U. S.) 266 (1845); Carpenter *v.* Bailey, 53 N. H. 590 (1873); Holmes *v.* Clisby, 121 Ga. 241, 48 S. E. 934 (1904). This seems to have been Chief Justice Cockburn's view in Morrison *v.* Belcher, 3 F. & F. 614 (1863); Hedley *v.* Barlow, 4 F. & F. 224 (1864); Blake *v.* Stevens, 4 F. &. F 232 (1864). But in the law of England and a number of the states a bad motive, or "bad faith," is now required to defeat a qualified privilege. Clark *v.* Molyneux, 3 Q. B. D. 237 (1877); Joseph *v.* Baars, 142 Wis. 390, 125 N. W. 913 (1910); Ely *v.* Mason, *supra*. Such a requirement is inconsistent with the law generally applicable to negligent acts, and it unduly restricts recovery. The argument for the rule that negligence defeats a qualified privilege depends finally, like the argument for the rule that refusal to retract defeats a qualified privilege, on a balance of interests. See W. A. Purrington, "An Examination of the Doctrine of Malice as an Essential Element of Responsibility for Defamation Uttered on a Privileged Occasion," 6 AM. LAW. 365. For discussion of the effect of negligence as a conditional privilege, see also 12 HARV. L. REV. 221; 16 HARV. L. REV. 71; 29 HARV. L. REV. 533; 57 U. PA. L. REV. 243. *Cf.* Jeremiah Smith, "Liability for Negligent Language," 14 HARV. L. REV. 184.

[16] Palmer School *v.* Edmonton, 61 D. L. R. 93 (Alta. Sup. Ct., 1921). The defendant was held protected in making his publication, on the ground of conditional privilege, since there was no evidence of malice. The court said that a refusal to retract might have changed the result. For the facts of this case, see RECENT CASES, *infra*, p. 885. The court does not make it clear on what ground it bases its *dictum*, and thus does no more than "suggest" the view indicated.

[17] See BOWER, CODE OF ACTIONABLE DEFAMATION, 124 *et seq.*; ODGERS, A DIGEST OF THE LAW OF LIBEL AND SLANDER, 5 ed., 249 *et seq.* See also 7 HARV. L. REV. 312.

[18] *Cf.* Child *v.* Affleck, 9 B. & C. 403 (1829). *Cf.* also Lawless *v.* The Anglo-Egyptian Cotton Co., L. R. 4 Q. B. 262 (1869); A. B. *v.* X. Y. [1917] S. C. 15.

[19] *Cf.* Ormsby *v.* Douglass, 37 N. Y. 477 (1868); London Association for Protection of Trade *v.* Greenlands, [1916] 2 A. C. 15. Under the rule suggested, the English courts might feel safe in broadening the qualified privilege now extended to credit agencies. *Cf.* Macintosh *v.* Dun, [1908] A. C. 390.

Compromises might be suggested. Refusal to retract, in those jurisdictions where negligence does not, of itself, defeat a qualified privilege, might forfeit the immunity only when the original report was negligently made. One who refuses to retract might be held liable for such damages only as could be shown to flow from that refusal. On the other hand, one might be held to refuse on peril of later proof of the falsity of his statements. And he might be rigidly required to make his retraction full, as public as the original statement, and before action. On the whole, however, the position that refusal to make a reasonable retraction destroys the immunity of a conditional privilege seems the most satisfactory, whether it be embodied in decision or statute.[20]

THE EFFECT OF NOTICE TO THE BUYER OF INTENDED RESALE BY AN UNPAID SELLER. — The right of an unpaid seller having a lien on the goods to resell them is well established in this country.[1] It is generally held that notice of intention to resell is not essential,[2] and the authorities agree that there need not be notice of the time and place of resale.[3] By the prevailing view, the one requisite to the validity of the resale is that it be made at such a time and place and in such a manner as to afford reasonable protection to the interests of the defaulting buyer.[4] If the seller fulfills this requirement, he may recover from the buyer the difference between the resale price and the original contract price.[5]

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[20] Such a law would, in effect, impose a new liability for failure to act. On this point, see James Barr Ames, "Law and Morals," 22 HARV. L. REV. 97, 111–113.

As to when a retraction may reasonably be demanded, see the citations in note 14, *supra*.

One of the advantages of narrowing the definition of conditional privilege by making it defeasible by refusal to retract or negligence is that a ground is thus afforded for enlarging its scope to include some of the cases which are otherwise treated as gossip, and governed by the harsh law of absolute liability. Under the proposed rule, the family minister, doctor, or lawyer, or anyone in the position of family adviser, might safely enjoy a conditional privilege in making a communication to a girl as to the character of her suitor. *Cf.* Joannes *v.* Bennett, 5 Allen (Mass.) 169 (1862). One who without negligence makes a report under a reasonable but mistaken belief in the existence of circumstances which would make his statements privileged might well be afforded similar protection. *Cf.* Hebditch *v.* MacIlwaine, [1894] 2 Q. B. 54. See 8 HARV. L. REV. 235. *Cf.* also Macintosh *v.* Dun, *supra*.

[1] See WILLISTON, SALES, c. 16; BURDICK, SALES, 3 ed., 289; 2 MECHEM, SALES, §§ 1621 *et seq.*

[2] See Wrigley *v.* Cornelius, 162 Ill. 92, 44 N. E. 406 (1896); Van Brocklen *v.* Smeallie, 140 N. Y. 70, 75, 35 N. E. 415, 416 (1893). *Cf.* Pratt *v.* Freeman Co., 115 Wis. 648, 92 N. W. 368 (1902). *Contra*, Dill v. Mumford, 19 Ind. App. 609, 49 N. E. 861 (1898). See WILLISTON, SALES, § 548; 2 MECHEM, SALES, §§ 1633–1636.

[3] Woodward *v.* Tyng, 123 Md. 98, 91 Atl. 166 (1914). *Cf.* Walker *v.* Gateway Milling Co., 121 Va. 217, 92 S. E. 826 (1917). See WILLISTON, SALES, § 549.

[4] Clore *v.* Robinson, 100 Ky. 402, 38 S. W. 687 (1897). See Morris *v.* Wibaux, 159 Ill. 627, 646, 43 N. E. 837, 842 (1896). *Cf.* Ackerman *v.* Rubens, 167 N. Y. 405, 60 N. E. 750 (1901). See WILLISTON, SALES, § 547.

[5] Dustan *v.* McAndrew, 44 N. Y. 72 (1870); Van Brocklen *v.* Smeallie, 140 N. Y. 70, 35 N. E. 415 (1893); Bowden *v.* Southern, etc. Co., 206 S. W. 124 (Tex. Civ. App., 1918). See 2 MECHEM, SALES, § 1643. The seller may keep any profits from the resale. Bridgford *v.* Crocker, 60 N. Y. 627 (1875). See UNIFORM SALES ACT, § 60 (1); WILLISTON, SALES, § 553.